93-660

Supreme Court, U.S.
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No. 93-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN L. HIRSH,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari
To the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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October 1993

QUESTION PRESENTED

Does an instruction to the jury in a state criminal trial to keep the reasonable doubt rule "in proper perspective" and to temper its application with "common sense" violate the Due Process Clause?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STEVEN L. HIRSH respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania, entered on February 12, 1993, as to which allowance of appeal was denied by the Pennsylvania Supreme Court on July 28, 1993, affirming his conviction and sentence on several counts of Medicaid fraud.

OPINIONS BELOW

The Memorandum of the Superior Court of Pennsylvania on direct appeal, filed on February 12, 1993, is not published. It is noted at 627 A.2d 202 (table) and is Appendix B to this petition. The Memorandum Opinion of the Court of Common Pleas, Dauphin County, Pennsylvania, denying post-trial motions, filed on

February 7, 1992, is not published. It is Appendix C.

JURISDICTION

The Order of the Pennsylvania Supreme Court denying allowance of appeal from the Superior Court's judgment affirming the petitioners' convictions was entered July 28, 1993. App. A. This petition is filed within 90 days thereafter. 28 U.S.C. § 2101(d); Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Title 62 of Purdon's Pennsylvania Statutes, Section 1407, provides, in pertinent part:

> (a) It shall be unlawful for any person to:
>
> (1) Knowingly or intentionally present for allowance or payment any false or fraudulent claim or cost report for furnishing services ... under medical assistance, ... or to knowingly submit false information,

for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services ... under medical assistance ....

(2) Solicit or receive or to offer to pay any remuneration, including any kickback, bribe or rebate, directly or indirectly, in cash or kind from or to any person in connection with the furnishing of services ... for which payment may be in whole or in part under the medical assistance program ....

* * *

(7) Submit a claim which misrepresents the description of services, supplies or equipment dispensed or provided; the dates of services; the identity of the recipient; the identity of the attending, prescribing or referring practitioner; or the identity of the actual provider.

* * *

(12) Enter into an agreement, combination or conspiracy to obtain or aid another to obtain reimbursement or payments for which there is not entitlement.

* * *

Amendment XIV to the United States Constitution provides, in pertinent part, that "no State shall deprive any person of ... liberty or property without due process of law."

STATEMENT OF THE CASE

This petition arises from a case involving an alleged fraud against the Medicaid program by a medical doctor in Philadelphia. The trial court imposed fines and a jail sentence of one to 23 months.

a. Procedural History

Petitioner Steven L. Hirsh, M.D., a radiologist, was charged in 1991 in the Court of Common Pleas for Dauphin County, Pennsylvania with various offenses under the Medicaid Fraud and Abuse Act, 62 Pa.Stat. § 1407 (Purdon's). R.R. 1, 3-

9.[1] The bills of information charged that with respect to 21 billings for 18 particular patients petitioner submitted claims for compensation in connection with both the technical and professional components (taking and reading) of X-rays that in fact he had read but which a chiropractor had taken. 62 Pa.Stat. § 1407(a)(1), (2), and (7). Bill No. 3496C charged a conspiracy between petitioner, chiropractor David DeFries "and others unnamed" from December 6, 1983, through March 31, 1986, in violation of id.(a)-(12). R.R. 9 (original all caps). The overt act alleged in furtherance of the conspiracy count was "Billing for the taking of X-rays which service was, in

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[1] The underlying Complaint and Warrant were filed on October 24, 1990. References to "R.R." are to the Reproduced Record filed in the Pennsylvania Superior Court.

fact, provided by another Medical Assistance provider at a different location." Id.

On August 8, 1991, the appellant was convicted after a four-day jury trial on all counts of all four bills. R.R. 1. By Memorandum Opinion and Order filed February 7, 1992, the trial court denied post-trial motions.[2] R.R. 2 (docket); Addendum C to this Petition. On February

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[2] On post-trial motions, the defendant, by prior counsel, contended:

1. The evidence was insufficient to establish the required knowledge and intent to defraud on the substantive counts, or specific intent on the conspiracy count.

2. The trial court erred in instructing the jury that the defendant was either guilty of all 21 counts within each bill, or not guilty of all 21.

3. The trial court erred in refusing to charge that where circumstantial evidence is equally consistent with either guilt or innocence, the jury must choose the inference consistent with innocence.

12, 1992, the court imposed concurrent sentences of one to 23 months' confinement, a $1100 fine ($50 on each of the 21 counts of Bill No. 3496 and a $50 fine on Bill No. 3496C), and cos's of prosecution. The court also imposed restitution of $1852 pursuant to 62 Pa.Stat. § 1407(b)(2)(i), and the maximum (treble) penalty pursuant to id. § 1407(b)(2)(ii) of $5556, for a total additional statutory penalty of $7408. R.R. 345; see N.T.Sent. 12. Petitioner was permitted to remain at liberty on $2000 cash bail pending appeal. R.R. 346. That bail remains effective until the disposition of this Petition. Pa.R.Crim.P. 4011.

The Superior Court affirmed. The appellate court excused the trial court's jury instruction urging the jury to keep the burden of proof beyond a reasonable doubt "in proper perspective" and not to

apply it "to the exclusion of common sense" by finding it to be "simply another way of instructing the jury that the Commonwealth need not establish appellant's guilt beyond a moral certainty, or with mathematical certainty ...." App. B5-B6.[3] The state supreme court denied allowance of appeal. App. A.

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[3] The Superior Court panel adopted the trial court's opinion on sufficiency with respect to intent to defraud. App. B1. The court rejected the petitioner's ineffective assistance claim with respect to his counsel's failure to object to the lack of proof that Dr. Hirsh was personally responsible for submitting the false claims, as required by case law, without explanation, as "meritless." Id. at 2. Finally, the court below rejected without remanding for a hearing the contentions that trial counsel failed to prepare Dr. Hirsh to testify or to meet with the Probation Officer, and that counsel failed to communicate to Dr. Hirsh in a timely fashion the Commonwealth's

Preservation of federal issues.

Petitioner challenged the constitutionality of the trial court's supplementary reasonable doubt instruction on direct appeal to the Superior Court, charging (as required in Pennsylvania with respect to issues not raised at trial) that prior counsel rendered ineffective assistance in failing to object. The constitutional issue was also raised in the Petition for Allowance of Appeal to the state supreme court and in a letter citing as supplemental authority this Court's recent decision in Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182 (June 1, 1993). See Rule 14.1(h).

_____(footnote continued)

offer of a plea bargain that might have kept him out of jail.

B. Statement of Facts

The charges in this case arose out of an agreement between the defendant-petitioner, Dr. Steven L. Hirsh, and certain chiropractors that the defendant would share with them Medical Assistance ("MA" or "Medicaid") payments he received for reading X-ray films. The chiropractors took the X-rays of their patients at their offices and submitted them to petitioner to read and interpret, and then to bill the Commonwealth's Department of Public Welfare ("DPW") for both taking and reading the films. Under the agreement petitioner would remit 75% of the funds received to the chiropractors, keeping the remaining 25% for himself.[4]

---

[4] The Medicaid regulations of DPW submitted in evidence show that the usual division of payment between the "technical component" and the "professional component" is 60% for

The agreement was formed in late 1983, and continued until late 1985.

Neither chiropractor told petitioner, although both knew it, that a chiropractor is not authorized under the MA regulations to be reimbursed for the taking of X-rays. There was nothing secretive about the agreement, and no one testified that any illegality was ever discussed. The X-rays taken at DeFries's office to be read by petitioner were identified on the film, at petitioner's suggestion according to DeFries, with Hirsh's name and address. R.R. 145-46. In each instance in which the chiropractors forwarded X-rays to petitioner, he would read them and render his professional opinion, either orally (if the

_____(footnote continued)

taking the X-ray and 40% for reading and interpreting it. E.g., R.R. 277.

situation was acute) or in writing.[5] R.R. 137.

The chiropractors had received materials from DPW explicitly stating that they were not authorized to seek payment for taking X-rays. R.R. 283-85 (Exh. C-7). The materials sent to medical doctors such as the defendant-appellant, on the other hand, at best suggested this by unexplained implication. R.R. 274-82 (Exh. C-6). In any event, there was no testimony, direct or circumstantial, that petitioner had ever read or heard of the rule barring chiropractors from reimbursement for taking X-rays or that he knew that a chiropractor

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[5] The chiropractors testified that they did not actually wait for or rely upon Dr. Hirsh's reports; R.R. 60, 94-95, 99-100; but there was no testimony that Dr. Hirsh knew this, and nothing in his conduct to suggest that he knew.

was not within any of the categories of providers listed as eligible in the materials his office had received. The Commonwealth's expert witness did not even know where in a library an interested person could look to find these regulations. R.R. 102.

Records of the Department of Public Welfare were introduced into evidence, most by stipulation, showing that such reimbursements were sought and paid for the 18 patients named and in the 21 instances charged in the bills of information. These invoices contained the allegedly intentionally false statements charged in Bill Nos. 3496 and 3496B: the statements in question, having to do with whether the service provided involved both the technical and the professional components of a radiological consultation, and the location

where the service was rendered, appear on these forms only in numerical codes, not in English.[6] No evidence was presented that petitioner knew the code at the time in question. In addition, the evidence was uncontradicted that petitioner's name was rubber-stamped onto each form (albeit on his behalf), and that while the critical information was added to the forms at petitioner's office, not the chiropractor's, he did not fill out any of them himself.

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[6] The invoices say "54" for type of service, which the materials placed in evidence explain as claiming both the technical and professional components; "57" means professional component only. The place of service was given as "01" on the invoices, which the regulations say means "principal office." R.R. 287-88. There was no evidence that Dr. Hirsh ever knew this, or that he knew that one could not properly give "01" as the answer to that item if the reading and report were done in the office but not the filming, assuming that this is even so.

Dr. Hirsh testified in his own behalf, denying guilty knowledge or any intent to defraud, and contradicting the Commonwealth's cooperating witnesses on several factual points. A large and diverse group of personal and professional friends attested to petitioner's character for honesty and integrity by swearing to the defendant's excellent reputation for those traits.

REASON FOR GRANTING THE WRIT

The decision below disregards this Court's precedents by permitting a state trial court to undermine the Due Process requirement of proof beyond a reasonable doubt with an instruction that the jury should keep the rule of reasonable doubt "in proper perspective" and temper it with "common sense."

After giving a fairly standard instruction on reasonable doubt,[7] the trial court added the following original and decidedly non-standard flourish of its own:

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[7] The trial court charged the jury that a reasonable doubt is "an honest doubt arising out of the evidence itself; the kind of doubt that would restrain a reasonable man or woman from acting in a matter of importance to him or herself." The court further cautioned the jury that a reasonable doubt "is not a doubt that is fancied or conjured up in the minds of a jury to escape an unpleasant verdict. ... It is not a doubt that is sought for, not a doubt that is conjured up from sympathy or prejudice or the desire to avoid the discharge of a disagreeable duty." R.R. 309.

> Now, because of the stress placed on reasonable doubt, I always add this because I think a jury should give some thought about this phrase in our system of jurisprudence.
>
> You must keep this standard of reasonable doubt in proper perspective. It does not require that the Defendant be shown guilty beyond any and all doubt or any such similar standard.
>
> While you are sworn to protect the legal rights of the accused you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

R.R. 310. The state appellate court below upheld this unusual charge as no different from the instructions which inform the jury that proof beyond a reasonable doubt is not necessarily proof to a mathematical certainty or "beyond a moral certainty." App. B5. The analogy is inapt. There is a world of difference between an attempt to explain to the jury what the "reasonable" in "reasonable doubt" means, and an obvious effort to

disparage that fundamental rule.

This Court has recently emphasized the Due Process limitations on trial court efforts to define reasonable doubt for a jury. An instruction on reasonable doubt must not denigrate or undermine the importance of that bedrock concept of due process. In Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), this Court summarily reversed a conviction where the trial court had instructed the jury in a manner which equated "reasonable doubt" with "a grave uncertainty," a "moral certainty" and an "actual substantial doubt." These definitions could have misled a reasonable juror into allowing "a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id. Accord, Holland v. United States, 348 U.S. 121, 140 (1954) (reasonable doubt instruction not

erroneous unless it "could mislead the jury into finding no reasonable doubt when in fact there was some").

The extra set of comments added to the reasonable doubt instruction in this case represents a gross deviation from any standard instruction precisely because it could encourage a jury to set aside a reasonable doubt it otherwise was inclined to entertain. The "proper perspective" for the "standard of reasonable doubt," to use the trial court's phrase, is to remember at all times the central role of that precept in protecting the innocent from wrongful conviction. In re Winship, 397 U.S. 358, 363 (1970). A trial court should never

employ language designed to downplay its importance.[8]

The jury's sworn duty "to protect the legal rights of the accused" cannot be set aside in favor of any conception of "common sense" that the jurors may have apart from the law. Lay persons may very well feel that the standard of reasonable doubt, properly understood, does not comport with "common sense." They may feel, in reliance on "common sense," that "where there's smoke there's fire," that a person faced with a decision should "bite the bullet," that

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[8] The erroneous jury instruction in this case was not ambiguous or confusing; it directly invited the jurors not to concern themselves overmuch with the rule of reasonable doubt. Therefore, this case does not present the issue left open in Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182, 188 n.1 (1993), concerning any tension that may exist between Cage, supra, and Boyde v. California, 494 U.S. 370 (1990).

"he who hesitates is lost," or that the authorities are unlikely to charge an innocent person.

Defense counsel had no reasonable basis in the interest of the accused not to object to this harmful charge, which, coming at the end of the instruction on reasonable doubt -- and ending with an entirely unbalanced warning against accepting the arguments of defense counsel -- cannot have failed to send a clear signal to the jury that the judge did not wish them to be overly concerned with the non-sensible technicality called "reasonable doubt."[9]

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[9] The failure to object was therefore an instance of ineffective assistance of counsel. The Superior Court found otherwise because, in its view, there was no error in the charge. Since there obvi=ously was error, and constitutional error to boot, the failure of counsel to object was ineffective. This affords grounds

In Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182 (June 1, 1993), this Court unanimously held that constitutional error in a state trial court's reasonable doubt instruction is reversible per se and cannot be harmless error. The reasonable doubt rule is not necessarily at all consonant with a juror's understanding of "common sense." This Court should grant the petition and summarily reverse the judgment of the Superior Court, ordering the Pennsylvania courts to allow a new trial.

_____(footnote continued)

for relief from the waiver of the issue that would otherwise attach under Pennsylvania appellate procedure and permits this Court to reach the merits of the federal issue.

CONCLUSION

For the foregoing reasons, petitioner STEVEN L. HIRSH prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania affirming his convictions.

Respectfully submitted,

PETER GOLDBERGER
Attorney for Petitioner

October 26, 1993.

APPENDIX A

[103 M.D. 1993]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 103 M.D. Allocatur Docket 1993
Respondent	:	
	:	Petition for
v.	:	Allowance of
	:	Appeal from the
STEVEN L. HIRSH,	:	Superior Court
	:	
Petitioner	:	

O R D E R

PER CURIAM

AND NOW, this 28th day of July, 1993, the Petition for Allowance of Appeal is hereby DENIED.

APPENDIX B

J. A54004/92

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
STEVEN L. HIRSH,	:	Harrisburg Office
Appellant	:	No. 00142 Harrisburg, 1992

Appeal from the Judgment of Sentence of the Court of Commcn Pleas, Dauphin County, Criminal Division, at Nos. 3496, 3496A, 3496B and 3496C C.D. 1990.

BEFORE: JOHNSON, FORD ELLIOTT

and BROSKY, JJ.

FILED: FEBRUARY 12, 1993

MEMORANDUM:

This appeal is from the judgment of sentence following the conviction of appellant by a jury of various provisions of the Medicaid Fraud and Abuse Act.[1]

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[1] The specific provisions of which appellant was convicted are Section 1407(a)(1), (2), (7) and (12).

Appellant challenges the sufficiency of the Commonwealth's evidence in that it failed to prove an intent to defraud. He also asserts that counsel was ineffective in failing to challenge in post-verdict motions the failure of the Commonwealth's proof that appellant personally signed or submitted allegedly false invoices. The opinion of the trial court written in support of it's denial of appellant's post-verdict motions has adequately and correctly disposed of appellant's sufficiency arguments. We therefore affirm on that basis. See Trial Court Opn., pp. 1-7. With respect to the ineffectiveness claim regarding the failure of counsel to challenge the lack of proof that appellant personally signed or submitted false invoices, we note that since this claim is meritless, counsel cannot be deemed ineffective for failing

to raise it. Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986).

Appellant also contends that he was unfairly prejudiced by certain jury instructions. His first claim in this regard is that the court erred in refusing to charge the jury as follows:

> [I]f under the circumstantial evidence it [the jury] finds that there are two equal but opposite inferences that can be drawn from the evidence, one is consistent with innocence and the other is consistent with guilt, that they [the jury] must, under the circumstances of this case, choose the inference of innocence--

N.T., 355. Appellant cites Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977), to support his position that the above requested instruction should have been given to the jury. The issue in Hubbard was whether circumstantial evidence was sufficient to preclude the possibility that someone other than the appellant had murdered the victim. The language in Hubbard on which appellant

purports to base his proposed jury instruction is taken from Commonwealth v. Woong Knee New, 354 Pa. 188, 47 A.2d 450 (1946). The language in appellant's proposed instruction, however, is actually taken from a similar proposed instruction which was rejected by this court in Commonwealth v. Adams, 273, Pa. Super. 484, 417 A.2d 751 (1979). Appellant has conveniently omitted a significant portion of applicable language in Woong Knee New, which explains his reason for discounting the applicability of Adams to the case at bar on the basis that Adams relies upon language in a pre-Hubbard decision. Appellant's Brief, p. 20. We advise appellant that the pre-Hubbard decision upon which Adams relied was Woong Knee New, the same authority upon which Hubbard relies. The applicable language appearing in Woong Knee New reads in its entirety as

follows:

> When two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty.

Emphasis supplied.

In Commonwealth v. Adams, supra, this court opined that the above language "sets standards for trial judges to follow in deciding whether to submit a case to the jury or [to] direct a verdict." At 192, 417 A.2d at 752. This makes sense in light of the observation of this court in Woong Knee New that "[w]hen a party on whom rests the burden of proof in either a criminal or civil case, [sic] offers evidence consistent with two opposing propositions, he proves neither." At 521, 47 A.2d at 468. Hence, appellant's requested instruction

simply begs the question. The actual language quoted above and upon which appellant purports to base his requested jury instruction says nothing, either expressly or by implication, about instructing a jury to select innocence over guilt if the evidence adduced is equally consistent with innocence as it is with guilt. It states, rather, that a jury is not permitted to speculate either way if the carrier of the burden of proof has proven nothing. Id. As the Adams court acknowledges, if the carrier of the burden of proof has proven nothing, the court is then required to direct a verdict in favor of the accused. Consequently, the conclusion of the court in this case that "such instruction would appear almost meaningless" is correct because our independent review of the evidence here does not indicate that appellant was entitled to a directed

verdict in his favor. Trial court Opn., p. 8.

Consequently, appellant's proposed instruction which would require the court to charge the jury that it must choose innocence over guilt if the circumstantial evidence is equally consistent with innocence as it is with guilt is not the law in this Commonwealth. Cases are legion in the appellant courts that circumstantial evidence is sufficient to convict if the circumstances are consistent with criminal activity, even though they may also be consistent with innocence, see, e. g., Commonwealth v. Bauswine, 354 Pa. 35, 46 A.2d 491 (1946), Commonwealth v. Adams, supra, and Commonwealth v. Moore, 226 Pa. super. 321, 311 A.2d 704 (1973), so long as the circumstances are proven at least beyond a reasonable doubt. Commonwealth v.

Bauswine, supra; Commonwealth v. Adams, supra. The trial court here charged the jury that in order to convict, it must find that the Commonwealth had proven its case against appellant beyond a reasonable doubt. Under the prevailing law, this, and not the instruction proposed by appellant, is what the Court was required to give to the jury. Id. We find no error in the court's refusal to give the requested charge.

The next jury instruction with which the appellant takes issue is that the jury should temper the rule of reasonable doubt with common sense. Appellant raises counsel's ineffectiveness in failing to object to this charge. Appellant objects to the following portion of the charge:

> Now, because of the stress placed on reasonable doubt, I always add this because I think a jury should give some thought about this phrase in our system of jurisprudence.

> You must keep this standard of reasonable doubt in proper perspective. It does not require that the [appellant] be shown guilty beyond any and all doubt or any such similar standard.
>
> While you are sworn to protect the legal rights of the accused, you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

N.T., 334. The crux of appellant's argument here is that the trial court's instruction, particularly with regard to its reference to "common sense", somehow tempered or diluted the importance of the standard of reasonable doubt to be used by the jury in reaching its verdict. We find this not to be the case. Instead, the expression used in this portion of the charge is simply another way of instructing the jury that the Commonwealth need not establish appellant's guilt beyond a moral certainty, or with mathematical certainty or as being

absolutely incompatible with innocence. See, e. g., Commonwealth v. Bauswine, supra, Commonwealth v. Adams, supra, Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989), and Commonwealth v. Hart, 348 Pa. Super. 117, 501 A.2d 675 (1985). Our review of the entire charge of the court discloses that the trial court instructed the jury that it must find that the Commonwealth has met its burden of proof against appellant beyond a reasonable doubt before it could be satisfied of his guilt. Since we perceive no error in the charge as given Commonwealth v. Adams, supra, we likewis find that counsel was not ineffective in failing to object to it.

Next, appellant maintains that tria counsel was ineffective in failing to move to quash the criminal information charging him with violating 62 P.S.

§1407(a)(7) because the information failed to allege the intent element of the statute. Appellant cites Commonwealth v. Lurie, 524 Pa. 56, 569 A.2d 329 (1990), for the proposition that a conviction for violation of Section 1407(a)(7) requires proof of knowing or intentional conduct. Since the language of criminal information did not contain the phraseology "knowingly or intentionally" the information was defective because it did not charge any criminal conduct. In Commonwealth v. Lurie, supra, the supreme court said: "[I]t is fundamental that to purposely misrepresent any of the information described in subsection (a)(7)[] is to knowingly present a false or fraudulent claim for payment." At 62, 569 A.2d 332; first emphasis in text; second emphasis supplied. The information in question charges as follows:

A LICENSED PHYSICIAN AND HEALTH CARE PROVIDER UNDER THE COMMONWEALTH'S MEDICAL ASSISTANCE PROGRAM,

DID SUBMIT CLAIMS IN DAUPHIN COUNTY TO THE DEPARTMENT OF PUBLIC WELFARE, MEDICAL ASSISTANCE PROGRAM, WHICH MISREPRESENTED THE IDENTITY OF THE ATTENDING, PRESCRIBING OR REFERRING PRACTITIONER OR THE IDENTITY OF THE ACTUAL PROVIDER IN VIOLATION OF 62 Pa.C.S. [sic] §1407(a)(7).

Emphasis supplied. Section 1407(a)(7) provides:

> (a) It shall be unlawful for any person to:
>
> * * *
>
> (7) Submit a claim which misrepresents the descriptions of services, supplies or equipment dispensed or provided; the dates of services; the identity of the recipient; the identity of the attending, prescribing or referring practitioner; or the identity of the actual provider.

Emphasis supplied. From a comparison of the criminal information with the statute, we can see that the information charges the offense in question in

substantially the same language as the statute. Commonwealth v. Taraschi, 327 Pa. Super. 179, 475 A.2d 744 (1984); Pa.R.Crim.P. 225(b)(5). Therefore, counsel will not be deemed ineffective in failing to file a motion to quash this information.

Next, appellant raises trial counsel's ineffectiveness in failing to prepare him to testify at trial and to be interviewed by the probation officer in the preparation of the pre-sentence report. Specifically, appellant asserts that his trial counsel advised him that he (trial counsel) had access to videotaping equipment in his office so that appellant could practice testifying and answering difficult questions so as not to undermined his credibility before the jury and the probation officer. Although appellant admits that counsel

thoroughly briefed him on the facts of the case and prepared him to testify and for the interview with the probation officer, he claims that counsel did not give him benefit of the psychological preparation which had been promised and that the only detailed briefing of the facts to which appellant would testify was given to appellant at a meeting with counsel the evening before trial. As a result, he was unable to make eye contact and his demeanor was otherwise weakened in some unspecified way both at trial and at the interview with the probation officer.

Appellant admits that he received adequate preparation. Optimal representation may have entailed this additional psychological preparation. However, appellant is only entitled to reasonably effective stewardship, not to

optimal representation. Commonwealth v. Garrity, 509 Pa. 46, 500 A.2d 1106 (1985). Moreover, the amount of time spent conferring with a client, however brief, does not give rise to a finding of ineffective representation. It is the quality of the meeting between counsel and the client, rather than its length or brevity, which measures effective representation. Commonwealth v. Fleming, 332 Pa. Super. 118, 480 A.2d 1214 (1984).

Lastly, appellant asserts counsel's ineffectiveness in failing to communicate to him a plea offer in a timely fashion. Appellant claims that he was only made aware of such an offer after the Commonwealth had rested its case. At the sentencing hearing, counsel for appellant advised the court that appellant had offered to cooperate with the Commonwealth's investigation of the chiroprac-

tors involved in this case. However, counsel also stated that appellant had refused to admit his guilt and wished to proceed to trial. On that basis, therefore, the Commonwealth rejected the offer. Moreover, counsel conceded: "[T]he reference to some plea bargain in this case was truly non-existent as Mr. Duncan [for the Commonwealth] will confirm. There was never an agreement offered to this defendant of a specific type." N.T., 4. Counsel than advised the court that the initial offer would require appellant to enter a plea with no sentencing recommendation. Counsel also conceded that the court would now sentence appellant without any recommendation in any event. At sentencing, the Commonwealth agreed that a plea bargain had been offered but then been withdrawn because appellant would not agree to whatever the proposed terms of

the bargain were.

Contrary to appellant's assertion in his brief to this court, the record does not indicate when the bargain was offered or communicated. However, the record does indicate that counsel did communicate the plea offer to appellant. Hence, the record belies appellant's claim of ineffectiveness in this regard.

Judgment of sentence affirmed.

DATED: February 12, 1993
JUDGMENT ENTERED

s/Shirley Bailey
Chief Clerk

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
V.	:	
	:	NO. 3496, 3496(A), 3496(B) CD 1990
STEVEN L. HIRSH	:	MEDICAID FRAUD

MEMORANDUM OPINION

The defendant, Steven L. Hirsh, was convicted by a jury on 21 counts of violating the Medicaid Fraud and Abuse Act, 62 Pa. C.S. Sections 1407(a)(1), (2), (7) and one count of violating section 1407(a)(12). Presently before the court are post trial motions filed on behalf of the defendant.

The defendant is a licensed medical doctor in the Commonwealth and was enrolled in the Medical Assistance program. In December of 1983 he entered into an agreement with Dr. David DeFries,

a chiropractor. Dr. Hirsh was a Physician - 01 provider in the said program and Dr. DeFries was a chiropractor - 07 provider. Under the terms of the agreement the defendant was to read X-rays submitted to him by DeFries and render written reports to him. Defendant was to bill and collect from the payment source. For his services, defendant was to receive twenty-five percent of the billings. The period covered by the instant case was from approximately 1984 through 1986, during which time both Hirsh and Refries submitted Medical Assistance invoices seeking payment for providing specific services to the same Medical Assistance patients. The Commonwealth alleged the defendant submitted fraudulent invoices for the purpose of obtaining greater compensation than that to which he was legally entitled, for seeking payments for specific services

which misrepresented the identity of the actual provider of those services, for knowingly or intentionally soliciting or receiving or offering to pay any remuneration directly or indirectly from or to any person in connection with the furnishing of services under the Medical Assistance programs, and for entering into an agreement, combination or conspiracy to obtain or to aid another to obtain reimbursement or payments for which there is not entitlement.

The defendant had entered into a similar agreement with Dr. Raymond Rogowski, a Chiropractor.

The Medical Assistance program does not permit chiropractors to charge for X-rays. On twenty-one occassions [sic] DeFries took X-rays of Medical Assistance patients in his office for which defendant billed the Medical Assistance

program under his physician provider number.

The defendant testified he did not know the arrangements with DeFries or Rogowski was illegal and did not know chiropractors were not included in the physician - 01 category. The defense also presented substantial character testimony.

The first argument submitted by the defense is that the evidence was insufficient to support the jury's verdict.

The statute at 62 Pa.S. section 1407 provides in pertinent part:

> (a) It shall be unlawful for any person to:
>
> (1) Knowingly or intentionally present for allowance or payment any false or fraudulent claim or cost report for furnishing services or merchandise under medical assistance, or to knowingly present for allowance or payment any claim or cost report for medically unnecessary services or merchandise under medical assistance, or to knowingly submit false information for the purpose of obtaining greater compensation than that to which he is

legally entitled for furnishing services or merchandise under medical assistance, or to knowingly submit false information for the purpose of obtaining authorization for furnishing services or merchandise under medical assistance.

(2) Solicit or receive or to offer to pay any remuneration, including any kickback, bribe or rebate, directly or indirectly, in cash or in kind from or to any person in connection with the furnishing of services or merchandise for which payment may be in whole or in part under the medical assistance program or in connection with referring an individual to a person for the furnishing or the arranging for the furnishing of any services or merchandise for which payment may be made in whole or in part under the medical assistance program.

(7) Submit a claim which misrepresents the description of services, supplies or equipment dispensed or provided; the dates of services; the identity of the recipient; the identity of the attending, prescribing or referring practitioner; or the identity of the actual provider.

(12) Enter into an agreement, combination or conspiracy to obtain reimbursement or payments for which there is not entitlement.

The defendant contends that while DeFries and Rogowski were aware that the conduct violated the act since they so testified

and had knowledge by reason of receiving a Medical Assistance Handbook sent to Chiropractors, the defendant had not received such handbook and the chiropractors had not transmitted their knowledge to the defendant and that the defendant did not know that the agreement and its performance violated of the act.

The defense cites Commonwealth v. Lurie ___ Pa. ___ 569 A.2d 329 (1990) where the Court held that an essential element of violations of certain sections of the Act required knowing and intentional conduct calculated to deceive and mere reckless conduct or negligence is not conduct calculated to deceive. As to the conspiracy under section 1407(a)(12) the Commonwealth, it is urged, must prove beyond a reasonable doubt there was an agreement, combination or conspiracy to obtain or aid another to obtain reimbur-

sement or payment for which there is not entitlement. Here, it is said, there was no direct evidence as to the sharing of the requisite criminal intent to commit the offense; Commonwealth v. Wilson, 449 Pa. 235, 296 A.2d 719 (1972).

The real difficulty with the defense position is that on each of the invoices submitted the defendant certified he was billing the Department of Welfare for the actual taking of the X-rays (technical component) as well as for interpreting the X-rays (the professional component). Further the Commonwealth presented evidence that the billings were subject to the Department of Welfare regulations dealing into radialogy [sic] and provided to the physician. These regulations stated -

> Provider types 0-1, Physician; 0-4, Podiatrist; 10, Independent Medical/ Surgical Clinics; 11, General Hospitals; 12, Rehabilitation Hospitals; 20, Portable X-ray Providers; and 30, Family Planning Clinics, are the

only providers eligible to receive payment for the listed diagnostic x-ray procedure codes. (Emphasis Supplied)

Perhaps, most significantly, Dr. Rogowski testified both he and Dr. DeFries had attended a meeting together with Dr. Hirsh and the subject matter was the termination of the written contractual agreements and the defendant, Dr. Steven L. Hirsh wanted to continue the arrangements.

Evidence was also presented by Michael Ross, a chiropractor, employed during the relevant time period by David DeFries whose testimony established that he was familiar with the DeFries Chiropractic Center's procedures dealing with the taking of x-rays and in certain situations a Dr. Hirsh plate would be used when the actual x-ray was taken at the DeFries Chiropractic Center. Further, that the chiropractors at the DeFries Chiropractic Center would take

the x-rays based on their evaluation and they would continue treating the patients based on their reading of the x-ray at the time. Under cross-examination when counsel for the defendant intended to establish the x-rays were being sent out in order to obtain the defendant Steven L. Hirsh's, specialized knowledge of what was on the films, the witness responded that essentially he did not know why the films were sent out to Dr. Hirsh.

Dr. David DeFries testified that he was the employer of several chiropractors during the relevant time period including Michael Ross, and he was the owner of x-ray equipment located at his facility and was aware that he could not bill the State for the taking of x-rays for Medical Assistance patients, and he discussed this with other chiropractors. He stated that in late 1983 he had a

meeting with some friends where this situation was discussed and as a result of that meeting, he received a telephone call from Dr. Steven Hirsh within several days of the meeting with his friends. During the telephone conversation with Steven Hirsh, the offer by Steven Hirsh was that if DeFries sent him x-rays, he would do the billing and send a report to DeFries of the x-rays and also send DeFries 75% of whatever Hirsh collected.

DeFries further testified that initially all of the billing work was to be done by Steven L. Hirsh's staff, and that this arrangement was changed by the defendant whereby David DeFries' staff would now prepare the billings and forward same to the defendant, Steven L. Hirsh. Additionally, approximately two or three months after the onset of this agreement, David DeFries testified that

to the best of his recollection he was contacted by the defendant, Steven L. Hirsh, and the suggestion was made by the defendant, Steven L. Hirsh, that perhaps it would be better if the x-rays that were taken by DeFries and his staff should be identified with Hirsh's identification plate on the x-rays.

DeFries further testified that once his employees were to prepare the Medical Assistance invoices, they received specific instructions from the defendant, Steven L. Hirsh, including original blank physician Medical Assistance invoices and, DeFries' employees typed the information on the invoices. This typed information did not include the defendant, Steven L. Hirsh's identification number, the diagnostic code, nor the usual and customary charge for the services being billed. This information

was filled in by Steven L. Hirsh and/or his personnel.

David DeFries' testimony concerning the meeting dealing with the termination of the agreement was essentially similar to Raymond Rogowski's testimony; i.e., a meeting was held, attended by the defendant, Steven L. Hirsh, as well as the witnesses where the subject matter was the termination of the agreement and it was Steven L. Hirsh who wanted to continue the agreement and proposed an alternative.

In view of all the testimony, the Commonwealth met its burden of proving this defendant knowingly and intentionally submitted invoices which contained the false and fraudulent information that he, Hirsh, had taken x-rays of specific patients on specific dates at a specific location when, in

fact, they were taken by someone else on the same date at a different location than that alleged in the invoice.

Even if the evidence is characterized as circumstantial, the Commonwealth may prove guilt beyond a reasonable doubt by wholly circumstantial evidence. Commonwealth v. DeSabetino, 535 A.2d 169, 369 Pa. Super. 300, Appeal denied 546 A.2d 56, 519 Pa. 652 (1989). However, whether circumstantial or direct the court must accept the reasonable inferences derived from the evidence upon which the jury could have based its verdict. Surely, the conduct of this defendant established that he knew chiropractors could not obtain payment for the taking of x-rays; he wanted his name to appear on x-rays taken by DeFries personnel and he wanted the agreement to continue when presented with the problem

involved. All of this, both circumstantial and direct points to the intent and knowledge of this defendant.

With respect to the second argument, the defense asserts the Trial Judge erred in his instruction to the jury. The instruction was as follows:

> Now, I will say this, although perhaps even the attorneys might disagree with me, it is conceivable that when you look at the record or when you remember the testimony that you might find that your verdict as to one of the patients that were involved would be not guilty and another one should be guilty, although at least in the way the Court views this--and, again, you do not have to follow what we tell you--but as the Court does view it, the person is either guilty or not guilty on all of the 21 matters which are brought before you in each of the informations.

Certainly, the court did not instruct the jury as a matter of law they had to find the defendant guilty of all 21 counts or not guilty of all 21 counts. Actually, the evidence was precisely the

same involving each count but the Court's view point did not bind the jury. Indeed the Court pointed out the jury would have to decide guilt or innocence in each of the 21 patient billings. Additionally, upon objections by Trial Counsel at the conclusion of the charge the Court did adopt Counsel's point and so charged the jury.

Finally, the defense avers the Court erred in failing to properly instruct the jury on circumstantial evidence. Specifically the Court was asked to instruct the jury that if from the circumstantial evidence they could draw two equal but opposite inferences, they must choose the one consistent with innocence. The Court finds no dispute with the principle of law and the cited case but under the evidence here, such instruction would appear almost meaningless. Simply the

circumstantial evidence did not present two equal but opposite inferences.

In accord with this discussion we enter the following:

ORDER

AND NOW, February [7], 1992 the post trial motions by the defendant, Steven L. Hirsh, for a new trial and in arrest of judgment are denied and the Attorney General is directed to call the said defendant for sentencing.

s/William W. Lipsitt
William W. Lipsitt, Senior Judge

Certified A True Copy
FEB 10 1992, 19__
s/Laurel Witmer
Clerk of Court

93-660

Supreme Court, U.S.
FILED
NOV 23 1993
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NO. 93-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN L. HIRSH,
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v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where petitioner's trial counsel did not object to the court's jury instruction explaining that the reasonable doubt standard does not require proof beyond all doubt and should not be applied to the exclusion of common sense, did the court below properly determine that petitioner received effective assistance of counsel?

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Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commonwealth of Pennsylvania, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the order of the Superior Court of Pennsylvania affirming the trial court's judgment of sentence. The Superior Court's unpublished memorandum opinion is reproduced in the appendix to the petition for writ of certiorari at App. B1-B17. The trial court's opinion is

reproduced in that appendix at App. C1-C16.

STATEMENT OF THE CASE

Petitioner, Steven L. Hirsh, (hereinafter "Hirsh") was convicted of medicaid fraud for his part in a scheme to circumvent regulations of the Medical Assistance Program. Hirsh, a radiologist, agreed to bill the Pennsylvania Department of Public Welfare for x-rays taken by two chiropractors, David DeFries and Raymond Rogowski. (R. at 64, 132-133). Both chiropractors used x-rays in the diagnosis and treatment of their patients but state regulations did not authorize medicaid payments for x-rays taken by chiropractic providers. (R. at 56, 105, 110-112). However, because Hirsh was a physician, he could bill the Department for taking and reading x-rays. (R. at 57-61, 105-106). Consequently, to get around the regulations, the chiropractors forwarded x-rays of their medicaid patients to Hirsh, who then prepared a

report and billed the department as if he had taken the films at his own office. (R. at 57-58, 130-131).

Rejecting Hirsh's contention that he did not realize chiropractors could not bill for x-rays (R. at 225), the jury convicted him on all counts. Following denial of post-trial motions, judgment of sentence was entered February 12, 1992.

After filing his notice of appeal to the Superior Court of Pennsylvania, Hirsh retained his current counsel, Peter Goldberger, Esquire. Hirsh then argued that his trial counsel had been ineffective. Among other things, Hirsh claimed his trial counsel should have objected to the trial court's instructions regarding reasonable doubt. The trial court told the jury it must keep the standard in proper perspective and realize that it does not require proof beyond all doubt

and should not be applied to the exclusion of common sense. (R. at 334). In an opinion rendered February 12, 1993, the Superior Court affirmed the judgment of sentence, opining that, considered in its entirety, the charge was proper. In a per curiam order dated July 28, 1993, the Pennsylvania Supreme Court denied allowance of appeal.

In presenting his ineffectiveness claim to the Superior Court, Hirsh relied exclusively on Pennsylvania case law. Neither the federal constitution nor any federal precedent was mentioned. Further, in rejecting Hirsh's claim, the Superior Court did not specify whether it was deciding the issue as a question of state or federal law, but again, no federal precedents were cited. The standard applied by Pennsylvania courts to claims of ineffectiveness under Article I, Section 9 of the

Pennsylvania Constitution is equivalent to the standard required by the federal constitution. See Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) (Pennsylvania's standard for ineffective assistance of counsel claims under Article I, Section 9 of the Pennsylvania Constitution is the same as that announced by this Court in Strickland v. Washington, 466 U.S. 668 (1984)).

REASONS WHY THE PETITION SHOULD BE DENIED

Hirsh asks this Court to grant certiorari to review the trial court's jury instructions on reasonable doubt. In his petition, Hirsh has quoted only a small portion of the charge. However, in evaluating a jury instruction, this Court considers it in the context of the charge as a whole. Francis v. Franklin, 471 U.S. 307, 316 (1985).

In context, it is clear that the trial court's charge was not designed to disparage the fundamental rule of reasonable doubt, as Hirsh now claims. Rather, the trial court simply explained to the jury that a reasonable doubt is one based on reason and common sense rather than a desire to avoid an unpleasant duty. The trial court said:

> Now, I'm going to go into the very important principles that are applicable to every case.

Sometimes its said that--there are three principles, but they are so intertwined that we submit to a jury these principles together. They deal with the presumption of innocence, the burden of proof, and reasonable doubt.

This Defendant, as well as any Defendant, comes before a jury presumed to be innocent, and the burden is upon the Commonwealth to prove his guilt beyond a reasonable doubt.

A reasonable doubt is not a doubt that is fancied or conjured up in the minds of a jury to escape an unpleasant verdict. It is not--it must be an honest doubt arising out of the evidence itself; the kind of doubt that would restrain a reasonable man or woman from acting in a matter of importance to him or herself.

A reasonable doubt is not a doubt that it sought for, not a doubt that is conjured up from sympathy or prejudice or a desire to avoid the discharge of a disagreeable duty.

If all of the evidence leaves no such doubt in your mind as to the guilt of the Defendant, then the Commonwealth is justified in demanding a verdict of guilty as to that

charge about which you have no reasonable doubt of guilt, and I tell you there are four different charges.

You can find the Defendant guilty of one; you can find the Defendant guilty of all; you can find the Defendant guilty of one or two and innocent of the others; but in any event, you must be convinced beyond a reasonable doubt of those charges for which you find him guilty, if you do find him guilty.

On the other hand, if you are satisfied of the innocence of the Defendant, he would, of course, be entitled to an acquittal. If you have a reasonable doubt of his guilt, he would be entitled to an acquittal just as much as if you were satisfied of his innocence.

Now, because of the stress placed on reasonable doubt, I always add this because I think a jury should give some thought about this phrase in our system of jurisprudence.

You must keep this standard of reasonable doubt in proper perspective. It does not require that the Defendant be shown guilty beyond any and all doubt or any such similar standard.

> While you are sworn to protect the legal rights of the accused, you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

(R. at 332-334). Throughout its charge, the trial court repeatedly emphasized that the Commonwealth had the burden of proving Hirsh guilty beyond a reasonable doubt. (R. at 332-334, 338, 345-348).

Although Hirsh claims the Superior Court's affirmance conflicts with prior decisions of this Court, he has not cited a single case in which this Court, or any other court, has held it is improper to instruct a jury to use common sense in determining whether reasonable doubt exists. Significantly, many courts of appeal, and various state courts, have upheld jury instructions equating a reason-

able doubt with a common sense doubt. See e.g., United States v. Garza, 980 F.2d 546 (9th Cir. 1992) (Model Criminal Jury Instruction for the Ninth Circuit, § 3.03 that a reasonable doubt is based on a common sense and reason does not suggest a higher degree of doubt than is required); United States v. Torres, 901 F.2d 205 (2d Cir. 1990), cert. denied, Cruz v. United States, 498 U.S. 906 (1990) (court approved instruction that defined reasonable doubt as "a doubt that appeals to your reason, your judgment, your experience, and your common sense"); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988) (no reversible error was committed by trial court who equated reasonable doubt with a "fair doubt" and defined "fair doubt" as one based on reason and common sense); State of Oregon v. Williams, 313 Or. 19, 828 P.2d 1006 (1992), cert. denied, Wil-

liams v. Oregon, ___ U.S. ___, 113 S.Ct. 171, 121 L.Ed.2d 118 (1992) (explanation that reasonable doubt is based on reason and common sense was approved).

Further, Hirsh's assertion that the trial court's instruction "represents a gross deviation from any standard instruction" is patently incorrect. To the contrary, many standard instructions admonish jurors that a reasonable doubt is one based on common sense. See, e.g., United States v. Velasquez, 980 F.2d 1275 (9th Cir. 1992), cert. denied, 113 S.Ct. 2979, ___ U.S. ___, 125 L.Ed.2d 677 (1993) (1989 Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction 3.03); United States v. Harris, 974 F.2d 84 (8th Cir. 1992) (Eighth Circuit Model Instruction 3.11); United States v. Hunt, 794 F.2d 1095 (5th Cir. 1986) (pattern jury instructions for the Fifth Circuit); Unit-

ed States v. Gibson, 726 F.2d 869 (1st Cir. 1984) cert. denied, Gibson v. United States, 466 U.S. 960 (1984), (Pattern Jury Instruction 21 formulated by the Federal Judicial Center); State of Colorado v. Russo, 677 P.2d 386 (Colo. Ct. App. 1983) (J. Berman, dissenting), rev'd en banc, 713 P.2d 356 (Colo. 1986) (model instruction that reasonable doubt means a doubt based on reason and common sense); Wintjen v. State of Delaware, 398 A.2d 780 (Del. 1979) (pattern jury instruction used almost universally in the state equates reasonable doubt with common sense doubt); McDuffie v. State of Georgia, ___ Ga.App. ___, ___ S.E.2d ___, 93 Fulton County DR P3064 (filed August 6, 1993) (state's pattern jury instruction included definition of reasonable doubt as one based upon common sense and reason); Bell v. State of Indiana, 610 N.E.2d 229 (Ind. 1993) (Indi-

ana Pattern Jury Instructions (Criminal) 11.01); State of Missouri v. Antwine, 743 S.W.2d 51 (Mo. 1987), cert. denied, Antwine v. Missouri, 486 U.S. 1017 (1988) (Missouri's Standard Jury Instruction, MAI-CR2d 2.20); State of Nebraska v. Gatson, 244 Neb. 231, 505 N.W.2d 696 (1993) (state court approved use of Eighth Circuit Model Criminal Jury Instruction); State of North Carolina v. Portee, 28 N.C.App. 507, 221 S.E.2d 722 (1976), cert. denied, 289 N.C. 618, 223 S.E.2d 395 (1976) (North Carolina Pattern Jury Instruction--Crim. 104.25); State of Ohio v. Seneff, 70 Ohio App.2d 171, 435 N.E.2d 680, 24 Ohio Op.3d 215 (1980) (R.C.2901.05); Hankins v. State of Texas, 646 S.W.2d 191 (Tex. Crim. App. 1983) (op. on reh'g) (state court upheld use of instruction contained in 1 E. Devitt and C. Blackmar, Federal Jury Practice and Jury

Instruction, § 11.14, at 310-311 (3d Ed. 1977)). Hirsh should at least be aware that even Pennsylvania's suggested standard jury instructions explain the importance of using one's common sense in reaching a verdict. See Pa.S.S.J.I. (Crim.) §§ 7.03, 7.05.

There is no basis for Hirsh's contention that the trial court's instruction sent a clear signal to the jury that the judge "did not wish them to be overly concerned with the non-sensible technicality called 'reasonable doubt.'" (Petition at 21). Consequently, Hirsh has not presented this Court with any reason to suspect his trial counsel was ineffective, and the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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December 1993

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1. The petitioner did not fail to preserve his federal question. 1

2. The instruction in this case, which told the jury, after explaining "reasonable doubt," to "keep this standard of reasonable doubt in proper perspective" and not to apply the rule "to the exclusion of common sense" cannot be equated with an instruction defining a reasonable doubt, in part, as one "based on reason and common sense." . 3

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Rule 14.1(h) 3

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

STEVEN L. HIRSH has petitioned this Court for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania, Pet. Appx. B, as to which allowance of appeal was denied by the Pennsylvania Supreme Court, Pet. Appx. A, affirming his conviction and sentence on several counts of Medicaid fraud. The respondent's brief in opposition ("BO") seeks to imply that he did not preserve his federal issue, and that the challenged jury instruction in this case is entirely conventional. Neither objection to the petition has merit.

1. The petitioner did not fail to preserve his federal question.

The BO implies, without arguing, that petitioner somehow failed to preserve properly the federal issue presented in this petition. BO at 5-6. The state cases that petitioner cited in the Superior Court, however, all purport to apply the federal standard for proof beyond a reasonable doubt. The state cases also recognize and claim to follow (as respondent admits) this Court's precedent on the standard for effective assistance of counsel. Nor does respondent dispute that the constitutional issue was also raised in the Petition for Allowance of Appeal to the state Supreme Court and in a letter citing Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182 (June 1, 1993), as supplemental authority. The issue presented in the

petition ha[illegible]ot been waived. See Rule 14.1(h).

2. The instruction in this case which told the jury, after explaining "reasonable doubt," to "keep this standard of reasonable doubt in proper perspective" and not to apply the rule "to the exclusion of common sense" cannot be equated with an instruction defining a reasonable doubt, in part, as one "based on reason and common sense."

A comparison of the full jury charge on reasonable doubt and related subjects, as quoted in the BO at 7-9, with the summary given in the Petition at 16-17 & n.7, will show that the Petition does in fact quote all of the pertinent language of the lower court's charge to the jury, and does not take the challenged portion out of context. Compare BO 7.

The BO does not even cite, much less discuss or distinguish, this Court's recent cases in Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), and

Sullivan, supra, on which the petition principally relies. Nor does the respondent seek to defend the judgment on the basis given in the lower court's opinion (not even in the alternative).[1] Instead, the BO asserts that it is proper for a judge to tell the jury, after presenting a proper explanation of the reasonable doubt rule, to "keep this standard of reasonable doubt in proper perspective," apparently by balancing "the legal rights of the accused" against a standard of "common sense." The respondent would justify this charge by equating it with standard instructions that define a

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1. The court below upheld the challenged jury charge as no different from instructions which inform the jury that proof beyond a reasonable doubt is not necessarily proof to a mathematical certainty or "beyond a moral certainty." App. B5. By ignoring this rationale, respondent apparently concedes petitioner's analysis that there is no similarity between the two.

"reasonable doubt," in part, as one "based on reason and common sense." If such an instruction had been given here, petitioner would have no complaint. But the challenged instructions in this case are almost the opposite of those standard instructions.

The standard instructions to which the respondent points tell that the jury, inter alia, that a doubt is "reasonable" if it is based on "reason and common sense." See also, e.g., Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704, 709-10 (1992) (op. ann. jmt., viewing that phrase as part of "model charge"). These instructions tell the jury that application of the reasonable doubt rule incorporates and embraces the jury's reliance on its members' own common sense as to what sort of doubt is "reasonable." In the present case, the court properly

informed the jury that a reasonable doubt is an "honest doubt arising out of the evidence itself" and that it is "the kind of doubt that would restrain a reasonable man or woman from acting in a matter of importance to him or herself." The challenged charge then went on, however, to "add" the suggestion that the jury "give some thought about this phrase in our system of jurisprudence." Sup.Ct. Rep.Rec. 310; N.T. 334.

It was then that the judge told the jury to "keep this standard of reasonable doubt in proper perspective," stating:

> While you are sworn to protect the legal rights of the accused you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

Id. The plain meaning of this final admonition, which concluded the entire section of the charge on burden of proof, reasonable doubt, and the presumption of innocence, is that "common sense" is different from and in some tension with, if not actually in opposition to, "the legal rights of the accused" and "the reasonable doubt standard."[2] This final instruction therefore created a substantial risk that the jury might reach "a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, supra.

The judge in a criminal case must never invite the jurors, as the trial

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2. The last phrase -- being limiting to arguments "concerning reasonable doubt" rather than referring to all the arguments of both counsel -- also cautioned the jury unfairly against being swayed by defense counsel's closing.

court did here, to cast aside the reasonable doubt rule if it does not conform to their idea of "common sense." This Court should grant the petition and summarily reverse, ordering the Pennsylvania courts to allow a new trial.

CONCLUSION

For the foregoing reasons and those given in the Petition, petitioner STEVEN L. HIRSH prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania affirming his convictions.

Respectfully submitted,

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